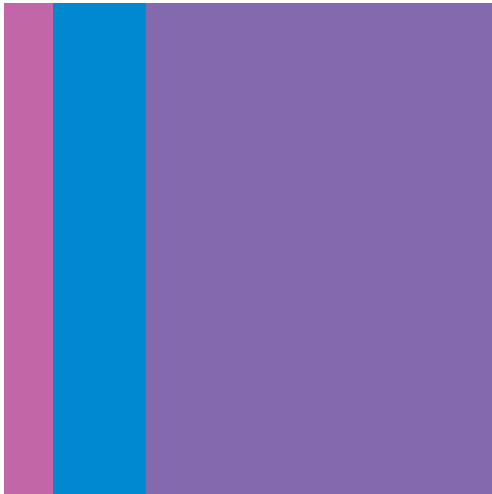


Enlarged Board of Appeal of the European Patent Office

Patentit-Teollisuus-Tekniikka 2012-2013
Erikoistyö

Jari Nieminen



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Appeal procedure is an essential element of every legal system nowadays, because it ensures uniform interpretation of the law while giving a chance to appeal against unfavorable decisions. The appeal procedure is generally multi-staged and decisions of a lower instance can be appealed to a higher instance. The highest instance handles only the most important issues so the amount of handled cases is clearly smaller than in lower instances.

European patents are granted according to the legal system defined in the European Patent Convention (EPC). As specified in the EPC, the first ap-peal stage is the Boards of Appeal which take care of all appeals requested by applicants. On top of that, the Enlarged Board of Appeal gives their deci-sion merely for the most fundamental questions regarding the EPC, such as if the case law of the Boards of Appeal is inconsistent or if the point of law in question is of significant importance.

In general, patents are granted for technical inventions which are novel, in-ventive, and industrially applicable. In case of patent applications that claim priority from an earlier application, validity of priority rights is a notable issue. This report familiarizes the reader with the EPC and the appeal pro-cedure under the EPC while providing a detailed study on the Enlarged Board of Appeal and its decisions regarding priority rights.

Keywords EPO, European patent office, EPC, Boards of appeal, Enlarged board of appeal, priority

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Julkaisija Aalto-yliopisto**Yksikkö** Aalto University Professional Development**Sarja** Aalto-yliopiston julkaisusarja CROSSOVER 12/2013**Tutkimusala****Tiivistelmä**

Valitusprosessi on keskeinen osa jokaista oikeusjärjestelmää nykyään, koska se mahdollistaa yhtenäisen tulkin laista samalla antaen mahdollisuuden valittaa epäsuotuisia päätöksiä vastaan. Valitusprosessi on yleensä moniportainen, ja alemman oikeuden päätöksistä voi valittaa korkeampaan oikeuteen. Korkein oikeus käsittelee vain tärkeimmät asiat, joten käsiteltävien tapausten määrä on selkeästi pienempi kuin alemmissa asteissa.

Eurooppapatentit myönnetään Euroopan patenttisopimuksen (European Patent Convention, EPC) määrittelemän oikeusjärjestelmän mukaan. Kuten EPC:ssä täsmennetään, ensimmäinen valitusaste on valituslautakunnat (Boards of Appeal), jotka käsittelevät kaikki hakijoiden vaatimat valitukset. Tämän lisäksi laajennettu valituslautakunta (Enlarged Board of Appeal) antaa päätöksensä ainoastaan EPC:hen liittyviin perustavanlaatuisiin kysymyksiin, kuten jos valituslautakuntien ennakkotapauksiin perustuva laki on ristiriitainen tai jos kyseessä oleva lakipykälä on todella tärkeä.

Yleisesti ottaen patentit myönnetään teknisille keksinnöille, jotka ovat uusia, keksinnöllisiä ja teollisesti käyttökelpoisia. Sellaisten patenttihakemusten tapauksessa, jotka hakevat prioriteettia aikaisemmasta hakemuksesta, prioriteettioikeuden pätevyys on merkittävä asia. Tämä raportti perehdyttää lukijan EPC:hen ja EPC:n valitusprosessiin samalla tarjoten yksityiskohtaisen selvityksen laajennetusta valituslautakunnasta ja sen päätöksistä prioriteettioikeuksiin liittyen.

Avainsanat Euroopan patenttivirasto, valituslautakunta, laajennettu valituslautakunta, etuoikeus, prioriteetti

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1 Introduction

Patents are a form of intellectual property, used for protecting technical inventions in all fields of technology. Essentially patents give their holders a set of exclusive rights for preventing others from utilizing a protected invention commercially. Protection is achieved in exchange for disclosing the invention to the public and it is in force only for a limited time. In general, patents are only granted for inventions that are new, inventive, and industrially applicable.

In Europe it, was necessary to apply for a patent in each European country before 1977, which in practice meant that the same invention was subject to different national laws, granting procedures, and languages [1]. Therefore, it was desirable to create a system in which an applicant could apply for a patent in a centralized manner in Europe. For this purpose, the European Patent Convention (EPC) was created, which enables centralized grant procedure based on a single patent application and it entered into force in 1977.

European patents are granted based on a legal framework defined by the EPC, which means that the EPC defines a set of articles for unified prosecution, opposition, and granting phases. On top of these, the EPC also specifies the procedures for appealing against decisions that have been made during the handling of an application. The appeal procedure is two-staged, such that first instance decisions are appealable before the Boards of Appeal while notable points of law may be forwarded further, to the Enlarged Board of Appeal, in case of uncertainty. The Enlarged Board of Appeal aims to ensure uniform interpretation of the law and clarify the fundamentally important points of law.

Since the role of the Enlarged Board of Appeal is of significant importance in solving controversial issues regarding the essential points of the EPC, this report will focus on decisions of the Enlarged Board of Appeal. Moreover,

priority rights are a fundamental part of patenting because without proper priority rights many continuation and divisional patents would be worthless. Hence, this report concentrates on the decisions of the Enlarged Board of Appeal regarding priority rights.

The rest of this report is organized as follows. Chapter 2 provides a quick overview on the structure of the European Patent Organization in addition to introducing the Contracting States of the EPC. The EPC is then summarized in Chapter 3 and the appeal procedure defined in the EPC is presented in detail in Chapter 4. Selected decisions of the Enlarged Board of Appeal regarding priority rights are studied in Chapter 5. Finally, a summary of this report is given in Chapter 6.

2 European Patent Organisation

European Patent Organisation (EPOrg) is a public international organization which has been formed by its contracting states back in 1977 for granting patents in Europe under the European Patent Convention (EPC) of 1973 [1]. Two organs form the EPOrg, Administrative Council of the European Patent Organisation and European Patent Office (EPO) (Art. 4(2) EPC).

The task of the EPOrg is to grant European patents, which is done by the EPO under the supervision of the Administrative Council (Art. 4(3) EPC). This chapter briefly presents the two organs of the EPOrg, the Administrative Council and the EPO. The current contracting states are introduced as well.

2.1 Administrative Council

The Administrative Council acts as the legislative body of the EPOrg, and as defined in Art. 4(3) EPC, it has been set up to look after the work of the EPO. Representatives of the EPO member states form the Administrative Council. In addition to overseeing the work of the EPO, the Administrative Council also ratifies the budget and approves the actions of the President of the Office.

Furthermore, the Administrative Council is also eligible for amending the rules of the EPC, as clarified in Art. 33 EPC in detail. The Administrative Council is competent to amend, for example, the following:

- Time limits laid down in the EPC and the Implementing regulations (Art. 33(1) EPC)
- Financial Regulations, Rules relating to Fees and Rules of Procedure (Art. 33(2) EPC)

On top of these, the duties of the Administrative Council comprise also being in charge of appointing the President of the EPO (Art. 11(1) EPC) and authorizing the President of the EPO to negotiate and conclude agreements on behalf of the EPO with different parties (Art. 33(4) EPC).

2.2 European Patent Office

The other organ of the EPOrg is the European Patent Office (EPO) which acts as the executive body of the EPOrg. The main task of the EPO is to grant European patents for the contracting states of the EPC, by using a single patent grant procedure. Although the patent grant procedure for European patents is centralized to the EPO, the granted patents are merely a bundle of national patents which means that from the point of view of enforcement, the EPO does not grant a single patent [2]. The grant procedure of the EPO will be discussed in more detail in Section 3.3.

Art. 15 EPC defines the departments of the EPO:

- *Receiving Section* is responsible for the examination on filing formal requirements (Art. 16 EPC)
- *Search Divisions* are responsible for preparing European search reports (Art. 17 EPC)
- *Examining Divisions* are responsible for the examination of applications (Art. 18(1) EPC)
- *Opposition Divisions* are responsible for the examination of oppositions (Art. 19(1) EPC)
- *Legal Division* is responsible for decisions in respect of entries in the Register of European Patents and the list of professional representatives (Art. 20(1) EPC)
- *Boards of Appeal* is responsible for the examination of appeals regarding decisions of the Receiving Section, the Examining Divisions and Opposition Divisions, and the Legal Division (Art. 21(1) EPC)
- *Enlarged Board of Appeal* is responsible for deciding on points of law referred to it by Boards of Appeal or by the President of the EPO in addition to deciding on petitions for the review of decisions of the Boards of Appeal (Art. 22(1) EPC).

It should be noted that infringement matters are outside of the jurisdiction of the EPO and are handled by national courts in case of European patents. However, the EPO has the power to invalidate a granted patent within nine months of the publication of the granted patent during the opposition procedure (Art. 99 EPC).

The official languages of the EPO are English, French, and German (Art. 14(1) EPC) and European patent applications have to be filed in one of the official languages (Art. 14(2) EPC). However, it's also possible to file an application in any other language, but in that case a translation to one of the official languages has to be provided within two months of filing the application. The language of the proceedings will then be the official language of the EPO, in which the European patent application was filed (Art. 14(3) EPC).

2.3 Contracting States

List of contracting states of the EPOrg is rather comprehensive and contains most of the countries in Europe. The list includes several European countries that are not members of the European Union (EU). In other words, the EPOrg is not related to EU and it is not legally bound by it.

At the time of writing this report, the following countries are members of the EPOrg [3]: Albania, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Monaco, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom.

Figure 1 illustrates the current contracting states of the EPO.

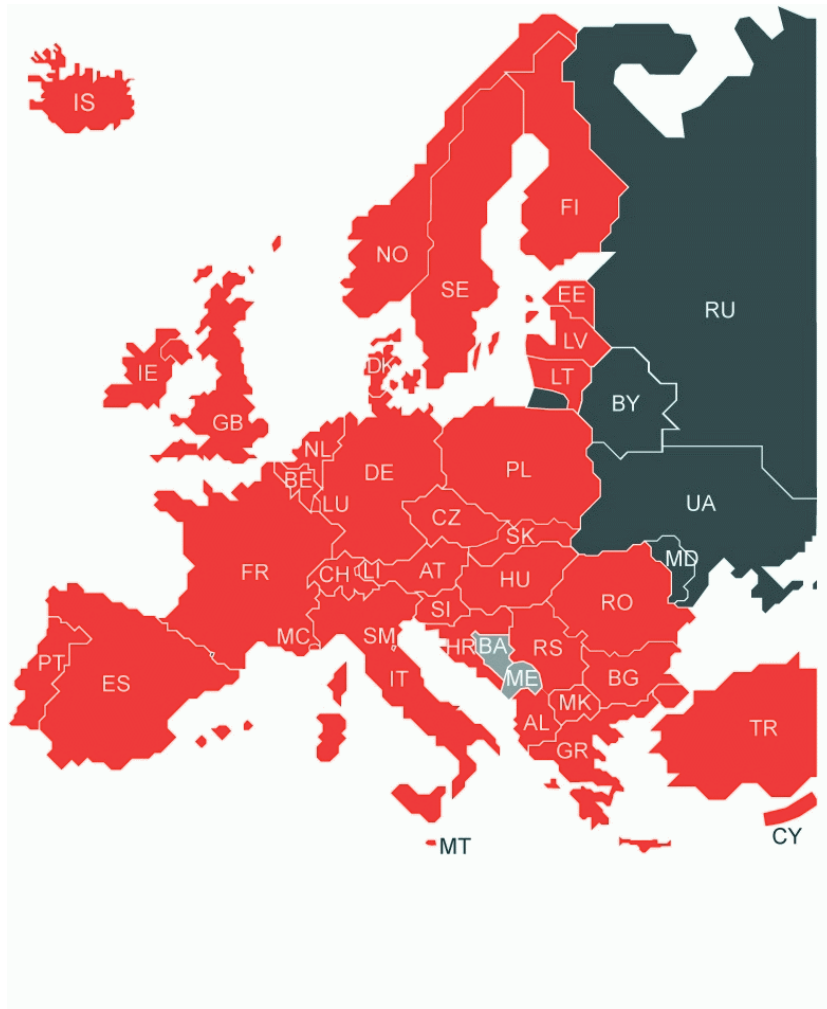


Figure 1: Contracting states of the EPO [4]

3 European Patent Convention

The European Patent Convention (EPC) is the basic legal system which defines the set of rules for granting European patents. The EPC consists of 178 main articles and several additional texts including Implementing Regulations, Protocol on Recognition, and Protocol on Privileges and Immunities. Nevertheless, due to the limited scope of this report, only the main articles of the EPC will be discussed in this chapter.

This chapter begins with an introduction to patentable inventions according to the EPC and then filing and requirements of European patent application are talked through. After this, focus is on the unified prosecution phase of the EPO before moving on to the procedures related to granting of a patent. Finally, in the end of this chapter the post-grant procedures, that may take place after granting a patent, are discussed; the opposition and limitation procedures.

3.1 Patentable Inventions

European patents are to be granted for inventions that are new, inventive, and industrially applicable (Art. 52(1) EPC). In addition, this article also states that patents shall be granted for inventions in all fields of technology, given that the previous requirements are fulfilled. Consequently, the claimed invention should have a “technical character” or involve a “technical teaching” in order to be patentable.

However, the EPC also sets additional restrictions for patentable inventions. According to [5], it was apparently impossible to come up with a positive definition of an invention during the drafting of the EPC and hence, the EPC includes a list describing what cannot be patented. The list includes the following limitations: a) discoveries, scientific theories and mathematical

methods; (b) aesthetic creations; (c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers; (d) presentations of information (Art. 52(2) EPC). That is to say, in view of the EPC the above list defines what is not regarded as invention.

In addition to these requirements and restrictions, the EPC includes some exceptions to patentability, which are defined in Art. 53(a-c) EPC. The main point behind these exceptions is to deny patents for inventions that are against public order ('ordre public'), good manners, and morale. Thus, it is only possible to get a patent for an invention which is ethically correct, in view of the European culture.

Novelty

In case of patentable inventions, one very important concept is novelty. The fundamental limitation is that an invention can be patented only if it is new, and in the EPC, novelty is defined in terms of the state of the art. Essentially, an invention is new if it does not form part of the state of the art (Art. 54(1) EPC). The state of the art is further clarified as something that has been made available to the public by the date of filing the application (Art. 54(2) EPC). In the EPC, the definition of the state of the art is so called "absolute state of the art", which means that there are no restrictions related to the means, time, or place of disclosure, nor to whom the art has been made available before the date of filing the European patent application [5].

In the European patent system, an application is kept secret between filing and publication and hence, it is possible that a conflict occurs with a later application that includes the same or a similar invention. In this case, the earlier application has naturally a prior right for the invention. It is not possible to grant two patents for the same invention (double patenting) so in order to avoid this, the earlier application is taken into account when considering the patentability of the later application (Art. 54(3) EPC).

It should be noted anyway that Art. 54(3) EPC only accepts European application as prior right because national applications are unavailable at the time of the search. This in practice means it is possible that two patents are

granted for the same invention in Europe and somewhere else for different inventors.

In other words, a first inventor may get a patent in US and a second inventor may get a patent in Europe for the same invention, if the second inventor files the application in Europe while the US application of the first inventor is still unpublished, given that the first inventor does not file an EP application claiming priority of the US application.

The EPC also includes two novelty related articles that are specifically directed to medical use. First, Art. 54(4) considers known substances or compositions to be new, if it is the first time those are used in such a medical method. This is called first medical use. Respectively, Art. 54(5) describes second medical use, meaning there is a new medical use of a substance or composition in case the first medical use is known.

Inventive Step

Inventiveness is another salient point in patenting. As discussed previously, an invention must be inventive in order to be patentable. In the EPC, inventiveness is determined by means of an inventive step. More specifically, an invention is considered to include an inventive step if it is not obvious to a person skilled in the art, in view of the state of the art (Art. 56 EPC).

The above definition of the inventive step includes several important characteristics. Inventive step is only possible if there is novelty, i.e., there has to be a difference between the invention and the state of the art. The extent of this difference actually defines the existence of an inventive step. Then, the question is about whether the invention lies beyond the capabilities of the skilled person, who has access to the state of the art in full.

The wording of Art. 56 EPC is deliberately quite general and does not provide much guidance for evaluating the inventive step. The idea behind this is that the interpretation is largely a matter of EPO policy [5]. The term “obvious” in the article is naturally subjective, however, the EPO exploits the problem and solution approach for making the interpretation of the term objective and more predictable. This approach basically characterizes the

invention and then the question is whether an inventive step exists, when the state of the art is taken into account, by using the perspective of a skilled person.

Art. 56 EPC also states that if the state of the art includes documents within the meaning of Art. 54(3), these documents are not considered while evaluating whether an inventive step exists or not. In practice, this means that the unpublished documents, which were filed before the priority date of a European patent application, will be taken into account only with respect to novelty, but not in the context of inventiveness. So basically it is enough to have a distinguishing technical feature compared with the unpublished prior art. Thus, the claims of the later application can usually be amended so that the earlier application is not prejudicial to novelty [6].

3.2 Filing and Priority

In general, any natural or legal person, or any body equivalent to a legal person by virtue of the law governing it, may file a European patent application (Art. 58 EPC). Filing of a European patent application is not limited in any way by the nationality and place of residence or business [6].

A European application can be directly with the EPO or alternatively, with a central industrial property office or other competent authority of a Contracting State, if the law of that particular State allows it (Art. 75(1) EPC).

Nevertheless, according to Art. 76(1) EPC, European divisional applications must be filed directly with the EPO so in that case there is no alternative. The main requirement regarding the context of divisional applications is that the content of the earlier application, as filed, cannot be extended. If this requirement is met, the divisional application is considered as filed on the date of filing the earlier application.

The word “application” is used in three different meanings in the EPC [5]. Art. 78(1) EPC defines the mandatory contents of European patent applications and uses the word in its broadest sense. This article states that a European patent application must contain a request for the grant of the patent, a description of the invention, one or more claims, any cited drawings, and an

abstract. In addition to the above, the application has to conform to the requirements defined in the Implementing Regulations

On the other hand, Art. 83 EPC uses a limited definition of a European patent application. This definition includes only the patent application itself, not the set of documents as in case of Art. 78 EPC. By taking into account the definition of the word “application” in Art. 83 EPC, a European patent must disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. The basic idea behind this is related to “teaching” a person skilled in the art and that way enhancing the level of technology. The main point of Art. 83 EPC is that a patent may be granted only if it provides a complete disclosure of the invention.

Additionally, the claims of a European patent application must define the matter for which protection is sought (Art. 84 EPC) while the abstract is only used for informing the public of the invention of the application (Art. 85 EPC). Therefore, abstract cannot be used for interpreting the scope of the protection or applying Art. 54(3) EPC.

Date of filing is extremely important because the state of the art is defined by it. Basically, the date of filing consequently determines the extent of search and examination. In the EPC, date of filing is the date on which the requirements laid down in the Implementing Regulations are fulfilled (Art. 80 EPC). The date of filing also has several other legal effects. For example, a European patent application is pending after that date and the applicant's right to the patent starts from this date.

A subsequent patent application will enjoy a right of priority during a period of twelve months from the date of filing of the first application (Art. 87(1) EPC). Furthermore, a right of priority for subsequent patent applications comes from the date of filing. Priority right can be gained from any national filing (Art. 87(2) EPC).

The outcome of the earlier patent application does not have any impact on the priority, which basically means that even though the earlier application would be abandoned or refused, it is still possible to continue with the later application normally (Art. 87(3) EPC). Nevertheless, the earlier application

has to be in force or pending when the subsequent application is filed (Art. 87(4) EPC).

Priority can be claimed simply by filing a declaration of priority and other required documents, as defined in the Implementing Regulations (Art. 88(1) EPC). It is also possible to claim priorities from multiple applications and these applications may come from different countries, but in that case the earliest date of priority determines the time limits related to the date of priority (Art. 88(2) EPC).

Anyway, the right of priority is valid only for those elements that are in the previous application(s) (Art. 88(3) EPC). In practice, this means that if something new is added to a subsequent application, the new parts will not have the priority date of the earlier application. Instead, the date of filing will be considered as the priority date for these new parts.

It is not required that the claims of the previous application(s) cover the elements of the invention for which the priority is claimed (Art. 88(4) EPC). According to the EPC, it is enough that the documents of the previous application as a whole specifically disclose such elements. So in principle, priority can be claimed for anything specified in the previous application(s).

3.3 Examination and Grant

European patent applications are examined by using a three-staged process; examination on filing, examination as to formal requirements, and substantive examination [5]. The purposed of the examination is to ensure that granted patents conform to the requirements defined in the EPC [7].

First, examination on filing is carried out after receiving an application. As defined in Art. 90(1) EPC, the EPO examines whether the application satisfies the requirements related to the date of filing, according to Art. 80 EPC, or not. If the requirements for the date of filing are not met, the application is not dealt as a European patent application (Art. 90(2) EPC).

Then, if the requirements for the date of filing are met, the next step is the examination as to formal requirements (Art. 90(3) EPC). Furthermore, in case that the application passes this stage of the examination, it is consid-

ered ready for publication. However, if the application does not pass the examination as to formal requirements, it is usually refused [5], even though Art. 90(4) EPC states that if there are deficiencies which may be corrected, the EPO gives the applicant an opportunity to correct them. Any deficiency noted in the examination under Art. 90(3) EPC has to be corrected anyway to avoid refusal of the application (Art. 90(5) EPC).

The final stage of the examination is the substantive examination (Art. 94 EPC) which is used to determine whether the application is patentable in view of Art. 52(1) EPC. At this stage, the EPO examines whether the invention is new, inventive, and industrially applicable. If the examination shows that the application is not acceptable, the applicant is invited as often as necessary to file his observations and amend the application if necessary (Art. 94(3) EPC). The applicant has to reply to communications from the EPO in time. Otherwise, the application is considered withdrawn (Art. 94(4) EPC).

So, the EPC provides the basic right to amend the patent application (Art. 123(1)). This article also gives the applicant a chance to amend the application voluntarily at the start of the substantive examination. Naturally, there are restrictions related to possible amendments. First, it is not possible to amend the application or the patent by adding subject-matter that was not disclosed in the application originally, i.e., the amendments cannot extend beyond the content of the application as filed (Art. 123(2) EPC). Secondly, the scope of protection cannot be extended either (Art. 123(3) EPC).

If the patent application is considered as acceptable by the examining division of the EPO, it has to decide to grant a European patent for the invention, if the conditions specified in the Implementing Regulations are fulfilled (Art. 97(1) EPC). This in practice means that the applicant is entitled to get a patent for the invention, if all the requirements defined in the EPC are met. Nevertheless, the EPO also has a right to refuse the application, if the requirements of the EPC are not fulfilled (Art. 97(2) EPC). The grant date will be the date when the patent is published in the European Patent Bulletin (Art. 97(3) EPC).

Mention of the grant brings several legal effects in its train [5]. According to Art. 2(2) EPC, European patents have the same effect and the same rights as a national patent granted in that State. Additionally, translations of the granted patent need to be filed as defined in Art. 65(1) EPC. Mention of the grant starts the opposition period which lasts for nine months (Art. 99(1) EPC) while centralized limitation and revocation procedures become possible as well (Art. 105a EPC).

3.4 Opposition and Limitation Procedures

Opposition is a post-grant procedure which allows public to challenge a wrongly granted patent within nine months of the publication of the mention of the grant of the European patent in the European Patent Bulletin (Art. 99(1) EPC). The opposition has an impact in all Contracting States where the patent is in force (Art. 99(2) EPC). On the contrary to the procedure up to grant, which is *ex parte*, the opposition is *inter partes* procedure and hence the opponents are parties of the opposition proceedings, in addition to the patent proprietor naturally (Art. 99(3) EPC).

Art. 100 EPC defines grounds for opposition. It is possible to make the opposition based on the argument that the patent is not patentable under Art. 52-57 EPC (Art. 100(1) EPC). That is to say, the validity of the patent may be challenged for example if it is not novel, does not include an inventive step or it is not industrially applicable. Another argument may be related to insufficiency of the disclosure, because the invention should be presented in a clear and complete manner so that a person skilled in the art may exploit it (Art. 100(2) EPC). In addition, the opposition can be justified also by referring to added subject-matter. As defined in Art. 123(2), the subject-matter of the patent cannot be extended beyond the content of the earlier application as filed (Art. 100(3) EPC).

If the opposition is acceptable, the Opposition Division examines the patent (Art. 101(1) EPC), and if the decision is that European patent is not valid, it will revoke the patent (Art. 101(2) EPC). Alternatively, it may revoke the opposition. It is also possible the patent is maintained in amended form (Art. 101(3) EPC) so the proprietor has a chance to amend the claims during the opposition proceedings. However, amending is restricted because the claims

can be only amended to address grounds for opposition. Naturally, the amendments must comply with the EPC as well.

So, the possible decisions of the Opposition Division are: revocation, rejection of opposition, and maintenance in amended form. Basically, the right to appeal comes from a negative decision. Therefore, in case of revocation the proprietor has a right to appeal. Respectively, in case of rejection of opposition, the opponent can appeal against the decision. If the decision was to maintain the patent in amended form, both parties may appeal [8].

The proprietor can also voluntarily amend the claims or revoke the patent by filing a request for limitation or revocation, respectively (Art. 105a(1) EPC). These requests cannot, though, be filed if opposition proceedings are ongoing (Art. 105a(1) EPC). The EPO will then examine whether the requirements for limiting or revoking the patent are fulfilled (Art. 105b(1) EPC) and decide to either to accept or reject the request (Art. 105b(2) EPC). The decisions will be backdated to the outset (Art. 68 EPC).

4 Appeal Procedure of the EPO

The very last step, but an optional one, of the grant and opposition process of the EPO is the appeal procedure before a board of appeal. Basically, all the decisions of the first instance departments of the EPO can be challenged using the appeal procedure.

In this chapter the organizational structures, liabilities and operations of the Boards of Appeal and Enlarged Board of Appeal of the EPO are introduced in general. Afterwards the appeal process of the EPO is discussed in detail, as defined in the EPC.

4.1 Appeal Organization of the EPO

The Boards of Appeal handle appeals regarding the decisions of the Receiving Section, Examining Divisions, Opposition Divisions and Legal Divisions, based on the requests of appellants. The boards are independent entities which are not bound by any instructions. Instead, the boards are required to comply with the EPC (Art. 23(3) EPC).

Administrative Council appoints the members of the Boards of Appeal for five years and they may be reappointed again after that period according to Art. 11(3) EPC and Art 23(1) EPC. The members can be removed from the boards only if there are serious grounds for doing that (Art. 23(1) EPC) but the members cannot be members of the Receiving Section, Examining Divisions, Opposition Divisions or Legal Division (Art. 23(2) EPC) at the same time.

Appeal organization of the EPO consists of the Enlarged Board of Appeal, 27 Technical Boards of Appeal, Legal Board of Appeal, and Disciplinary Board of Appeal. The Technical Boards of Appeal are further divided into

the following departments: Mechanical, Chemistry, Physics, and Electricity. The organization structure is depicted in Figure 2.

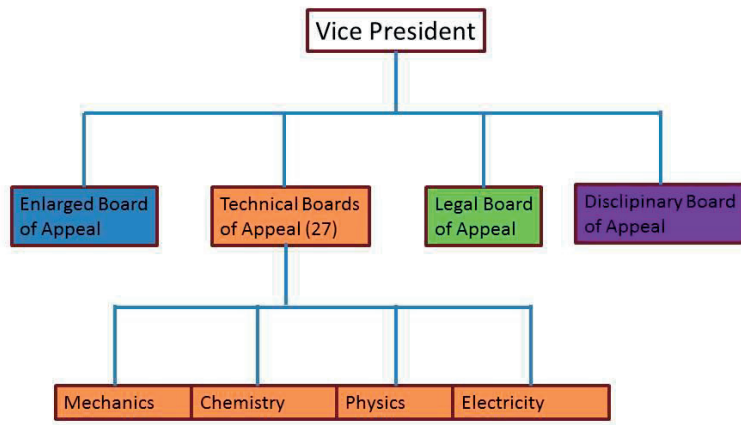


Figure 2: Appeal Organization [9].

The Legal Board of Appeal takes care of appeals against decisions of Receiving Section and Legal Division while the Technical Boards of Appeal address appeals against the decisions of Examining and Opposition Divisions. In addition, the role of the Disciplinary Board of Appeal is to handle appeals related to professional representation before the EPO.

On top of the above Boards of Appeal, the Enlarged Board of Appeal has been set up in order to ensure uniform application of the law and clarify the fundamentally important points of law. The mechanism for doing this task will be described in detail in the next section, in view of the relevant parts of the EPC.

The Administrative Council appoints the members of the Enlarged Board of Appeal as well, which consists of two technically qualified and five legally qualified members. The group of legally qualified members may include two members of national courts and/or authorities of Contracting States (Art. 11(5) EPC). In case of petitions for review, the Enlarged Board of Appeal includes two or four legally qualified members in addition to one technically qualified member [9].

4.2 Appeal Process

It is possible to appeal against decisions of the Receiving Section, Examining Divisions, Opposition Divisions and the Legal Divisions (Art. 106(1) EPC). In other words, all decisions of the above first instances are appealable while the Boards of Appeal and Enlarged Board of Appeal act as independent second instances.

The list is comprehensive and it in practice means that it is not possible to appeal against a communication received from a Search Division. The reasoning behind this interpretation is related to the nature of communication from Search Divisions. Fundamentally Search Divisions only form opinions instead of making decisions so those are not appealable. However, for example if a Search Division gives an opinion regarding lack of unity, it will be confirmed by an Examining Division and that decision is then again appealable [5].

Art. 106(1) EPC also states that an appeal has suspensive effect. Therefore, consequences of decisions are suspended until the decision on appeal is made.

Furthermore, the EPC does not allow appealing against intermediate or interlocutory decisions in general. That is to say, only decisions which do not terminate proceedings can be mainly challenged together with the final decision (Art. 106(2) EPC). Since intermediate or interlocutory decisions do not finish proceedings, those are usually not appealable. Nevertheless, in some exceptional cases that may be possible as well.

A party that has been involved in the first instance of proceeding has a right to appeal according to Art. 107 EPC, but this article also defines that only a party which has been adversely affected by a decision can appeal. Thus, the EPC does not enable appealing against positive decisions, only negative decisions are appealable. Negative decisions are decisions that do not agree with an explicit request of a party. Hence, if a request of a party is allowed in amended form, the party has a right to appeal.

Any other parties to the proceedings will be parties to the appeal proceeding as of right. More specifically, a party that did not appeal but was a party to the proceedings will become involved. But a party as of right cannot contin-

ue the appeal proceedings, if the appeal is withdrawn and thus the rights of a party as of right are limited [5].

The time limits of appeals are specified in Art. 108 EPC. Successful filing of an appeal includes two steps. Firstly, a notice of appeal must be filed within two months from the notification of the decision. The notice of appeal is considered to be filed once the fee for appeal has been paid, so the payment has to take place within those two months as well. Secondly, a statement defining the grounds of the appeal has to be filed within four months from the notification of the decision.

The EPC enables interlocutory revisions in case of clearly allowable appeals and in that case the appeal will not usually go to the appeal proceedings at all. This means that the department that made the previous decision is able to correct the decision within three months after receiving the statement of grounds. So if the appeal is admissible and well founded the department whose decision is contested has to rectify its decision (Art. 109(1) EPC). This has to be done within three months from the filing of the appeal; otherwise the appeal has to be forwarded to the Board of Appeal without any comments (Art. 109(2) EPC).

Then, the Board of Appeal carries out the examination if the appeal is admissible (Art. 110 EPC). This is done as specified in the Implementing Regulations. During the examination, the parties are invited to submit observations on communications issued by the Board of Appeal itself or alternatively, by another party [6]. Naturally, the purpose of this examination is to find out whether the grounds on which the appeal is based are valid.

A new or alternative set of claims should be filed together with the statement of grounds of the appeal so that there is a reasonable time to consider those. The board has a right to exclude late filed requests for amendments if there is no good reason for their lateness. The case may be sent back to the first instance in case of major amendments [5].

The Board of Appeal will decide on the appeal after examining the allowability of the appeal (Art 111(1) EPC). If an additional set of claims has been submitted with the notice of appeal, a decision on the main set of claims is done first. Then, if those are not acceptable, allowability of the auxiliary set

of claims is studied. The Board of Appeal may also decide to remit the case to first instance which gave the previous decision, i.e., the decision that was appealed against (Art. 111(2) EPC).

Decision or opinion of the Enlarged Board of Appeal may be asked in order to ensure uniform application of the law or if a point of law of fundamental importance arises (Art. 112(1) EPC). This can happen in two different ways. As a first option, the Board of Appeal may present a question to the Enlarged Board of Appeal if it thinks that a decision is required regarding the above matters (Art. 112(1)(a) EPC). Alternatively, the President of the EPO may refer to a point of law to the Enlarged Board of Appeal, if two Boards of Appeal have given different, controversial decisions about a same subject (Art. 112(1)(b) EPC).

Thus, in practice a party to the appeal cannot present a question for the Enlarged Board of Appeal, unless a Board of Appeal agrees during proceedings to forward the question to the Enlarged Board of Appeal. A Board of Appeal may also present a question to the Enlarged Board of Appeal by its own initiative.

Similarly as in case of the “regular” appeal procedure, the parties to the appeal proceedings will be parties to the proceedings of the Enlarged Board of Appeal as well (Art. 112(2) EPC).

Already final decisions are not affected by decisions or opinions of the Enlarged Board of Appeal, however, such decisions or opinions may have an impact on the pending cases of the Boards of Appeal [5]. However, there is a binding effect related to a decision of the Enlarged Board of Appeal because the Board of Appeal has to respect the decision for a case in question (Art. 112(3) EPC). On the other hand, these decisions are not binding in the future, so either a Board of Appeal or the Enlarged Board of Appeal can decide not to follow a decision but in that case some additional argumentation is needed. Therefore, previous decisions need to be taken into account naturally.

Any party to the appeal proceedings, that has got a negative decision, may though submit a petition for review of the decision by the Enlarged Board of

Appeal (Art. 112a(1) EPC). Nevertheless, a petition may be based only on certain grounds, as defined in Art. 112a(2) EPC:

- a member of the Board of Appeal had personal interest
- a person not appointed as a member of the Boards of Appeal was in the board
- a violation of a right to be heard took place (Art. 113 EPC)
- fundamental procedural mishandling occurred
- a criminal act established possibly had an impact on the decision.

If the petition is allowable, the Enlarged Board of Appeal will give a decision on it in order to re-open proceedings before the Boards of Appeal (Art. 112a(5) EPC).

5 Case Studies: Decisions of the Enlarged Appeal Board of the EPO Regarding Priority Rights

As discussed previously, the Enlarged Appeal Board of the EPO handles only specific questions that have been raised by a Board of Appeal or the President of the EPO. Naturally, the topics vary widely depending on the case in question, but since priority rights are of significant importance in patenting, the focus is on decisions of the Enlarged Board of Appeal regarding priority rights in this chapter.

The reason for the importance of priority rights is that a valid priority right is required in a continuation or a divisional application in order to make sure that the later application is considered to have the same filing date as the earlier application. The filing date then further defines the state of the art as discussed previously. In fact, in many cases the later application and the corresponding patent would be worthless without a valid priority right. Therefore, the priority right is often essential to ensure that a continuation or a divisional application has value.

The decisions considered in this chapter are selected from the website of EPO based on the topic [10]. All of the selected cases are related to priority rights, and more specifically, to divisional or subsequent applications claiming priority from an earlier application. The following decisions are studied: G1/05 Divisional/ASTROPOWER, G1/09 Pending application, and G2/98 Requirement for claiming priority of the “same invention”.

5.1 G1/05 Divisional/ASTROPOWER

In this case two Boards of Appeal had forwarded questions to the Enlarged Board of Appeal and these questions were handled jointly, in consolidated proceedings, because they were related to similar points of law. In this case the Enlarged Board of Appeal indeed gave their decisions regarding several questions.

First, the main questions, related to T 39/03 (OJ EPO 2006, 362), Technical Board of Appeal 3.4.02, were:

- (1) Can a divisional application which does not meet the requirements of Article 76(1) EPC because, at its actual filing date, it extends beyond the content of the earlier application, be amended later in order to make it a valid divisional application?*
- (2) If the answer to question (1) is yes, is this still possible when the earlier application is no longer pending?*

Secondly, the main question, related to T 1409/05 (OJ EPO 2007, 113), Technical Board of Appeal 3.4.03, was:

- (1) In the case of a sequence of applications consisting of a root (originating) application followed by divisional applications, each divided from its predecessor, is it a necessary and sufficient condition for a divisional application of that sequence to comply with Article 76(1) EPC, second sentence, that anything disclosed in that divisional application be directly, unambiguously and separately derivable from what is disclosed in each of the preceding applications as filed?*

So the issue in this case is related to Art. 76(1) EPC, second sentence, which states that a European divisional application may be filed only in respect of subject-matter which does not extend beyond the content of the earlier application as filed. If this condition is met, the divisional application is then deemed to have been filed on the date of filing of the earlier application and shall enjoy any right of priority. As a conclusion, the Enlarged Board of Appeal's view was that these issues do not mean that a divisional application, which does not conform to the EPC, would be invalid.

Furthermore, the main question in this case is whether there is a right to amend a divisional application such that it would comply with Art. 76(1) EPC. The conclusion of the Enlarged Board of Appeal was that divisional application should be treated in the same manner as ordinary applications, unless certain specific conditions in Art. 76 EPC and Art. 25 EPC require something different.

In addition, the board stated it is an important principle under the EPC that decisions about whether an application is acceptable, in view of the requirements of the EPC, is made based on the text finally submitted after any objections. It is also mentioned that an applicant should have a chance to overcome the objections by amending the patent application. Whether the application is an original application or divisional application is thus irrelevant. If amendments could not be used in order to make divisional applications acceptable, in view of Art. 76(1) EPC, different applications would be treated differently in practice and there is no objectively justifiable purpose for this.

Instead, that kind of practice would create a procedural trap, because applicants could file divisional applications with the same description and claims as the earlier application, just by arranging the claims in a new manner. Then, applicants could file amendments at a later stage in order to bring the application to the wanted form. As a result, the grant procedure would be delayed unnecessarily which is naturally not the purpose because it creates legal uncertainty for third parties for a longer time period.

The second question is related to amending divisional applications in case that the parent application is no longer pending. Again the Enlarged Board of Appeal referred to Art. 76(1) and stated that according to this article, a divisional application is a new application which is separate and independent of the parent application. Therefore, the procedure related to the divisional application is in fact independent of the procedure concerning a new application. Hence the divisional application should be treated as a new application. Although divisional applications are linked to their parent application, for example, in terms of time limits, the procedure of the parent application should not have an impact on the treatment of the divisional application.

Based on the above, the Enlarged Board of Appeal concluded that it is possible to amend the divisional application in order to remove added matter regardless of whether the parent application is pending or not. Divisional applications may be amended in the same way as any other non-divisional applications under Art. 123(2) EPC.

The question related to sequences of divisional application was handled similarly. The parent of a divisional application does not matter. All applications should be treated similarly anyway.

5.2 G1/09 Pending application/SONY

The question for this case came from the Legal Board of Appeal to the Enlarged Board of Appeal and the background of the question was related to a refused (parent) application. An examining division had refused the application at the end of oral proceedings. After three weeks from this decision, the applicant had filed a divisional application claiming priority from the refused application. The written decision about the refusal came after the filing of the divisional.

However, the applicant had not filed an appeal against the decision so the Receiving Section decided that the divisional application was not valid, because the refused application was no longer pending. If an appeal would have been filed, the refused application would still have been pending and hence, in that case there would not have been any problem with the divisional application. So the interpretation there was that orally given decision was enough and the refusal came into force on the date that the decision was given orally. Therefore, the refused application was no longer pending and no divisional could be filed from that application.

Consequently, the applicant filed an appeal to the Legal Board of Appeal, in which it was stated that the parent application was still pending when the divisional was filed, because there was some time left for appealing against the refusal decision. So as a main request, the appellant requested that the decision of the Receiving Section should be overruled and the auxiliary request was that the interpretation of the term “pending” should be referred to the Enlarged Board of Appeal. Since in view of the Legal Board of Appeal

the answer was not clear to this question and the ambiguity of the term “pending” remained, the following point of law was referred to the Enlarged Board of Appeal:

Is an application which has been refused by a decision of the Examining Division thereafter still pending within the meaning of Rule 25 EPC 1973 (Rule 36(1) EPC) until the expiry of the time limit for filing a notice of appeal, when no appeal has been filed?

The Enlarged Board of Appeal agreed with the Legal Board of Appeal and stated that this question needs to be clarified because it is related to a point of law of fundamental importance. Rule 36 EPC states that a divisional application can be filed from any (earlier) pending application. Although Rule 36 EPC had been changed during the handling of this appeal so that the new Rule 36 EPC includes some additional constraints for filing divisional (nowadays divisional applications need to be filed within 24 months from the first communication from an Examining Division), the Enlarged Board of Appeal still considered this question to be relevant. In the opinion of the Enlarged Board of Appeal, an answer to this particular question would be needed to ensure uniform interpretation of the new Rule 36 EPC.

The Enlarged Board of Appeal noted that the term “pending” is not used in a uniform manner in the EPC. This term is used in case of pending patent applications and in case of pending proceedings, however, the meaning is not the same in these contexts. After analyzing the difference between these definitions, the Enlarged Board of Appeal noticed that in view of Rule 25 EPC, a pending European patent application is an application which still has status that entitles substantive rights deriving from it.

Moreover, this observation lead to another question and the Enlarged Board of Appeal had to consider how long the substantive rights are in existence. In practice, the substantive rights include provisional protection and an application is considered never to have this kind of protection when it has been withdrawn, deemed to be withdrawn or finally refused. This indicates that the substantive rights exist after the refusal, until the refusal decision becomes final.

It was stated that *the final character of a first-instance decision will only ensure upon expiry of the time limit for filing an appeal* and the Enlarged Board of Appeal referred to several national provisions to show that this concept is well-founded in the Contracting States. Therefore, the Enlarged Board of Appeal concluded that *under the EPC a patent application which has been refused by the Examining Division is thereafter still pending within the meaning of Rule 25 EPC 1973 until the expiry of the period for filing an appeal and, on the day after, is no longer pending if no appeal is filed. The same conclusion applies to Rule 36(1) EPC 2000 both in its former and its current version.*

Since the rules regarding the filing of divisional applications were changed so that a divisional application must be filed within two years from either a first communication from an Examining Division or from a communication from the Examining Division regarding lack of unity. Therefore, this decision of the Enlarged Board of Appeal may have less relevance to practice than what would have been the case otherwise, because usually that two year period has passed before a refusal (or grant) decision [11].

5.3 G2/98 Claiming priority of the “same invention”

Before this case, there had been two lines of cases in the EPO in which the grounds for priority rights had been different. The first line of cases considered that the relevant subject matter should be present in the earlier application, expressly or implicitly, for a valid priority claim. On the other hand, the second line of cases considered that an additional feature in a claim is not legitimate if it is a mere disclaimer or if it is a matter of routine choice for the skilled person in the art. In either case, the additional feature does not change the nature of the claimed invention [12].

Thus, the President of the EPO had concluded that these two lines of case were in conflict and consequently used his power under Art. 11(1)(b) EPC in this case by forwarding the following point of law to the Enlarged Board of Appeal:

1a) Does the requirement of the “same invention” in Article 87(1) EPC mean that the extent of the right to priority derivable from a priority appli-

cation for a later application is determined by, and at the same time limited to, what is at least implicitly disclosed in the priority application?

1b) Or can a lesser degree of correspondence between the priority application and the subject-matter claimed in the later application be sufficient in this respect and still justify a right to priority?

2) If question 1b) is answered in the affirmative, what are the criteria to be applied in assessing whether the claim in the later application is in respect of the same invention as is in the priority application?

The President of the EPO further emphasized the importance of the above questions by stating that these questions have a significant impact on both, the applicant who wants to exploit the priority of an application and third parties which may be affected by the priority date. This is an important issue especially in case of possibly conflicting applications.

During the examination of this issue, the Enlarged Board of Appeal indeed found out that at least in one case the priority of a previous first filing for a claim was recognized, even though a feature had been added to the claim, which was not included in the priority application. On the contrary, in some other cases implicit disclosure test under Art. 123(1) EPC was required. Hence, the referral was accepted.

The Enlarged Board of Appeal then first studied whether it is necessary to have at least implicit disclosure regarding “the same subject-matter” for a priority right as required in Art. 87(4) EPC. Basically, the EPC forms a special agreement with the Paris Convention and it is not intended to be in conflict with the principles of that convention, in view of the priority right. Furthermore, according to the Paris convention, it is not acceptable to deny the right for priority even though certain elements of the claimed invention in a divisional application would not appear in the claims of the priority application. However, the restriction is that the priority application has to disclose such elements *as a whole*.

So, if the subject-matter of the claim is somehow disclosed in the priority application, implicitly or explicitly, the priority right should be given. Naturally the priority should be on the other hand refused if no such disclosure

exists. The Paris Convention also says that priority cannot be refused even though an application claiming priority includes some new elements, given that there is unity of invention. The Enlarged Board of Appeal also concluded from the Paris Convention that “element” was not understood as a feature but as an embodiment.

So, the concept of “the same invention” in Art. 87(1) EPC should be interpreted narrowly in order to connect it properly with the concept of “the same subject-matter” in Art. 87(4). This interpretation is consistent with the Paris Convention.

In addition, a subsequent filing has a priority right and is protected from novelty destroying documents published after the filing date of the earlier application only if the subsequent application is related to the same invention as the first application, which is the aim and objective of the right of priority (during a period of twelve months from the filing of the first application). There is no reason why the concept of “the same invention” should be interpreted differently than the concept of “the same subject-matter”. The narrow interpretation of the concept “the same-subject matter” is in line with Art. 88(2-4) EPC as well, which further justifies that the concept of “the same invention” should be treated in the same way.

Thus, the Enlarged Board of Appeal concluded that since the first question is answered in the affirmative, there is no need deal with the other questions, and the final conclusion was:

The requirement for claiming priority of “the same invention”, referred to in Article 87(1) EPC, means that priority of a previous application in respect of a claim in a European patent application in accordance with Article 88 EPC is to be acknowledged only if the skilled person can derive the subject-matter of the claim directly and unambiguously, using common general knowledge, from the previous application as a whole.

The effect of this decision in practice is that the Examining and Opposition Divisions of the EPO examine priority in the same way as they examine added subject-matter under Art. 123(2) EPC. Hence, literal or almost literal support will be required which should be taken into account when drafting applications and submitting amendments [12].

6 Summary

European patents are granted according to the legal system defined in the European Patent Convention (EPC), which was discussed in detail in this report. The main focus of this report was on certain decision of the Enlarged Board of Appeal of the European Patent Office (EPO). More specifically, this report presented three selected decisions of the Enlarged Board of Appeal regarding priority rights as case studies.

The first case study was *G1/05 Divisional/ASTROPOWER*, where the main question was about amending a divisional application, which extends beyond the content of the earlier application, later on in order to make it a valid divisional application. In this case the Enlarged Board of Appeal concluded that all applications should be treated similarly and hence, it is possible to amend the divisional application later on.

Secondly, *G1/09 Pending application/SONY* was dealt with. In this case, the question was related to the meaning of “pending application”. More specifically, the question was if an application which has been refused is still pending until the expiry of the time limit for filing a notice of appeal when no appeal has been filed. The decision of the Enlarged Board of Appeal was that a patent application is indeed considered as “pending” within this time limit, regardless of whether an appeal is filed or not.

The last case study was then *G2/98 Claiming priority of the “same invention”*. The main problem in this case was related to the definition of the “same invention” in Art. 87(1) EPC and the conclusion of the Enlarged Board of Appeal was that priority should be acknowledged only if a person skilled in the art is able to derive the subject-matter from the previous application as a whole, by exploiting common general knowledge.

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